

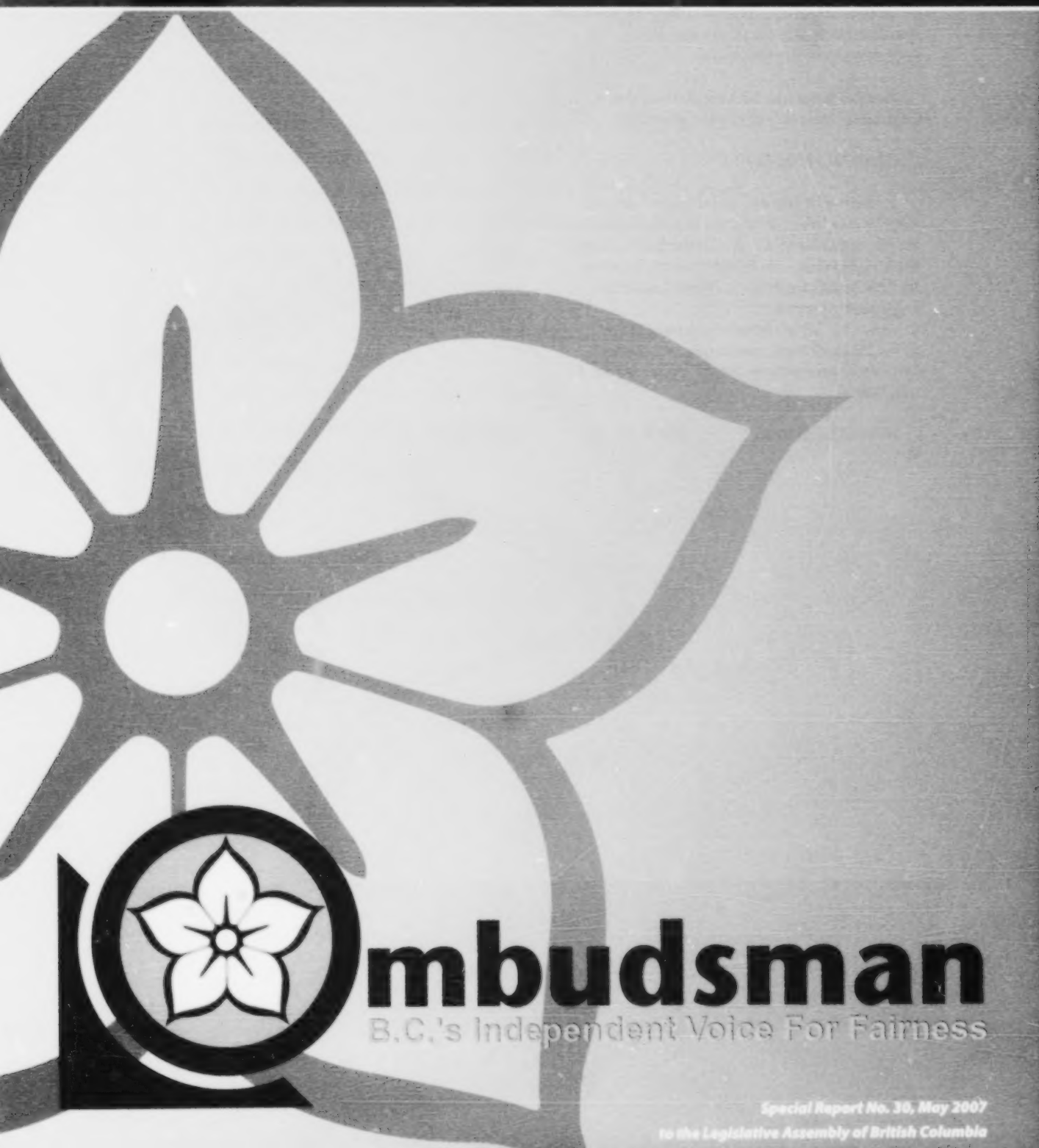
*Victims of Crime; Victims of Change: Transition and Discretion in
Crime Victim Assistance Legislation in British Columbia*



ombudsman
B.C.'s Independent Voice For Fairness

*Special Report No. 30, May 2007
to the Legislative Assembly of British Columbia*

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Library and Archives Canada Cataloguing in Publication Data

British Columbia. Office of the Ombudsman.

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and discretion in crime victim assistance
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ISBN 978-0-7726-5770-1

1. Victims of crimes – Legal status, laws, etc. –
British Columbia. 2. Victims of crimes – Services
for – British Columbia. 3. Compensation (Law) —
British Columbia. 4. British Columbia. Crime
Victims Assistance Act. I. British Columbia.
Legislative Assembly.
II. Title. III. Series: British Columbia. Office
of the Ombudsman. Special report ... to the
Legislative Assembly of British Columbia ; no. 30,
May 2007.

HV6250.3.C3B74 2007

344.71103'288

C2007-960116-2

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This is a report about making changes to government programs. It is about making those changes in the right way. It is about treating people in a fair manner. This report illustrates the risks of transition from old programs to new ones and the value of careful planning. It highlights the importance of identifying who will be affected by changes and clarifying how those individuals will be affected. It demonstrates the need for clear communication and the appropriate exercise of discretion.

This report is about more than 390 victims of crime who were told that they would receive cost of living adjustments on their support payments, about legislation that appeared to leave those benefits unchanged and about a reassessment of each of those cases, on a single day, that eliminated cost of living adjustments.

There was no public announcement of this change, no policy statement by the government that it intended to do this, nothing in the new legislation that seemed to require it and no regulations that set out how

this would happen. Instead, an unsigned, undated form letter arrived one day telling these victims of crime of a change that had already happened and implying there was nothing that could be done to reverse the change. How the change was made also raised concerns about whether, in the future, there would be more unexpected and inexplicable cuts.

This report is about one of those people, Ms. T., who felt that what had happened to her and to others was not fair. Happily, this is also a report about a ministry who could ultimately be convinced to remedy an unfair situation and take measures to prevent similar problems from occurring in the future.

I am hopeful that other public agencies will learn from the events described in this report and will act proactively to ensure that similar problems are avoided.

At the completion of this investigation, findings, reasons for those findings and recommendations were delivered to the Minister of Public Safety and Solicitor General with a request for a response. This was in accordance with section 23 of the *Ombudsman Act*.

The Minister of Public Safety and Solicitor General has accepted and directed action on all of our recommendations and I consider this to be a satisfactory resolution. This special report is made under section 31 of the *Ombudsman Act*.

A handwritten signature in cursive script that reads "Kim J. Carter".

Kim Carter
Ombudsman
Province of British Columbia

In 1997, shortly after her husband was killed as a result of a criminal act, Ms. T. applied for and was awarded financial support under provincial legislation. She was told by government authorities that her monthly payments would be subject to consumer price index adjustments that would continue until she died.

In July 1998, a lawyer at the Criminal Injury Section of the Workers' Compensation Board wrote to Ms. T. saying:

As you are aware, you will continue to receive indexed loss of support payments until your death.

In order to collect this indexed monthly pension, which was based on her husband's salary at the time of his death, Ms. T. had to assign to the provincial government her legal claims against the estate of the individual who killed her husband. Her lawyer was very careful to ensure that he had things pinned down for his client. He wrote to the Criminal Injury Section of the Workers' Compensation Board in 1999 to ask:

Before proceeding any further, would you please confirm that ... [Ms. T.] ... has been awarded a lifetime pension ... increasing twice a year in line with increases in the Consumer Price Index ...

The reply he received was:

[Ms. T.] ... has been awarded a lifetime loss of support payment in the initial amount of ... subject to twice annual consumer price index adjustments.

Ms. T. began to receive support payments and, over the course of a four year period, indexing increased the amount of those monthly payments by about 10 per cent a month. Reasonably, Ms. T. might have believed that the indexed payments would continue until she died.

Government always has the ultimate authority to change programs and benefits, but it has to do so in the right way. This case illustrates the importance of carefully planning the transition. In particular, it highlights the need to ensure that individuals whose entitlements have been determined and who are receiving services or benefits under an outgoing program are treated fairly and that the rights they have acquired are protected or only changed in accordance with the law and principles of administrative fairness. Transition planning requires governments to ensure that their intentions are clearly communicated and, in the case of benefits that are already being paid for a particular purpose, benefits that have "vested," government has to make clear its intention to change such benefits.

In 2001, the provincial government decided to change how victims of crime would be supported and introduced the *Crime Victim Assistance Act*. The government made it clear that the practice of paying out awards for pain and suffering would not continue under the new legislation. In addition, it stated for cost-related and other reasons, the program would no longer be administered by the Workers' Compensation Board. The then Solicitor General made it equally clear, however, in August 2001 in the legislature that:

All other existing benefits are being maintained and more victim-appropriate benefits will be introduced to replace pain and suffering awards. (Hansard, August 22, 2001)

Indeed, section 29(6) of the new *Crime Victim Assistance Act* stated:

Any compensation awarded under the former Act is deemed to be a benefit under this Act.

Section 26(3)(c) of the *Act* provides that regulations could be made that:

adjust, limit, increase, decrease or alter the amount, duration or frequency of compensation awarded under the former Act, or terminate compensation.

No such regulations were or have ever been made under that power.

Apparently to facilitate the transition to the new program, the provincial government then introduced the *Criminal Injury Compensation Amendment Act, 2002*. Again, the Solicitor General stated to the legislature in April 2002:

The *Criminal Injury Compensation Amendment Act, 2002* will remove pain and suffering awards in respect of applications received on or after April 16, 2002. Applicants will still be entitled to all other benefits under the act. (Hansard, April 9, 2002)

There was, however, a meeting of senior departmental managers about those existing benefits in the office of the Deputy Solicitor General in late April 2002. An e-mail from one of the managers stated:

After discussion ... a couple of weeks ago, it was decided we will tie the benefit level to the current levels for the WCA for the sections of our legislation that apply, however we will be repealing the cost of living increases that occur every January and July.

On May 29, 2002 there was a third reading of the *Workers Compensation Amendment Act, 2002*. Section 44 of that Bill repealed sections 13(3) and 13(4) of the *Criminal Injury Compensation Act*. Those were the sections that provided for cost of living adjustments to be applied to periodic payments. On June 21, 2002, by Order in Council, section 44 and other sections of the *Workers Compensation Amendment Act, 2002* were brought into force.

The new *Crime Victim Assistance Act* and the *Crime Victim Assistance (General) Regulation* came into force on June 30, 2002 and on that same day a number of other sections of the *Criminal Injury Compensation Act* were repealed.

Once these changes were made, victims of crime whose claims were still being adjudicated under the *Criminal Injury Compensation Act* and had not received a final determination were no longer eligible to receive cost of living increases as part of any award. However, there appeared to be nothing in the legislation that precluded cost of living increases that were already awarded from continuing.

On July 12, 2002, the Director of the Crime Victim Assistance Program, purporting to exercise discretionary powers under section 12(3) of the *Crime Victim Assistance Act* reassessed the eligibility for benefits of those people receiving a pension under the *Criminal Injury Compensation Act*.

Later in July 2002, Ms. T. and approximately 390 other victims of crime received an unsigned, undated letter from the new Crime Victim Assistance Program that told them:

The new Crime Victim Assistance Act is not linked to the Workers' Compensation Act and, therefore, cost of living increases on pension amounts will no longer be included.

Ms. T. felt she had not been fairly treated and complained in 2003 to the Office of the Ombudsman. The then Ombudsman, opened a file on this matter and a long and involved investigation began.

In July 2004, we were told by the Ministry of Public Safety and Solicitor General that section 26(3) of the *Crime Victim Assistance Act* authorized the enactment of regulations that would adjust, limit, decrease, alter or terminate benefits paid under the *Criminal Injury Compensation Act*. We were also told that the Director of the Crime Victim Assistance Program could reassess any award and alter its amount, duration, nature, content or form. This, we were assured, was sufficient to interfere with the "vested rights" of individuals who were already receiving indexed payments.

We raised further questions and, after receiving a response, the then Ombudsman made tentative findings that the decision to terminate the consumer price index adjustments awarded to Ms. T. was based on a mistake of law and unjust.

At a meeting in November 2005 to discuss those tentative findings, we were finally advised that in July 2002, the Director of the Crime Victim Assistance Program had exercised authority under section 12(3) of the *Crime Victim Assistance Act* and reassessed the eligibility of every person receiving indexed periodic payments awarded under the *Criminal Injury Compensation Act*. As a result of that reassessment, the victims were no longer eligible for cost of living adjustments, but their awards were otherwise unchanged.

Over the following year there was further correspondence between the Ministry and this office that focused on the necessity and appropriateness of this reassessment process. We were told this non-discretionary, mass, non-reviewable action was taken because it was necessary in order to establish the new benefit levels under the new legislation.

While section 12 of the *Crime Victim Assistance Act* provides for a reassessment where a victim's circumstances have changed in a way that affects his or her eligibility for a benefit, it does not provide authority to conduct mass reassessments for other purposes without regard to the individual circumstances of each case.

In addition, in our view, the reassessments were not conducted in accordance with basic and fundamental principles of administrative fairness. In the circumstances such as these, principles of administrative fairness would require:

- advance notice of decisions that may adversely affect an individual;
- an opportunity for the potentially affected individual to be heard and thereby protect his or her interests before a decision is made;
- sufficient information regarding the matters under consideration in order to fully exercise a right to be heard;
- an unbiased decision-maker;
- reasons for a decision; and
- information regarding any right of review or appeal.

The procedural safeguards noted above were not present.

The reassessment was a non-discretionary yet discretionary action. It was non-discretionary in the sense that the Ministry stated it had no choice. It was discretionary in the sense that the legislation provided a choice. This was a mass reassessment done in a blanket fashion without attention to the individual circumstances of the victims. It was individual in the sense that it was authorized to address changes in individual circumstances.

There appears to have been no need to conduct the reassessments as section 29 of the *Crime Victim Assistance Act* authorized the Crime Victim Assistance Program to continue to pay awards made under the former *Act*.

In November 2006, I informed the Minister of Public Safety and Solicitor General of my findings and recommendations. I highlighted the fact that there were repeated public statements, made by the provincial government that, with specified exceptions, existing benefits for victims of crime were being maintained. This message was reflected in section 29(6) of the *Crime Victim Assistance Act*. It was also consistent with the fact that no regulations had been made restricting or altering those benefits under section 26(3) of the *Crime Victim Assistance Act*. I explained that in my view these factors were sufficient to enable indexed periodic payments awarded under the former *Act* to be continued by the Crime Victim Assistance Program.

Section 12(3) of the *Crime Victim Assistance Act* states that the Director "may reassess a person's eligibility for a benefit." Regulation 34(8) of the *Crime Victim Assistance (General) Regulation* states, "If periodic payments ... are reassessed." There is nothing in the express terms of either provision or any other provision that would require such a reassessment before indexed periodic payments awarded under the *Criminal Injury Compensation Act* before June 30, 2002 could continue to be paid.

As no new information was received, no change of circumstances reported, and there appeared to be no other appropriate reason to reassess Ms. T.'s eligibility or the eligibility of the others in similar circumstances, I confirmed that I did not believe that the reassessment under section 12(3) of the *Crime Victim Assistance Act* was necessary.

Administrative decisions must be made using a process that is fair and appropriate. Ms. T. and the others who were receiving indexed periodic payments were given no advance notice of the decision, no information regarding the factors upon which the decision would be based, and no opportunity to present information or attempt to influence the outcome. They were precluded from having the decision reconsidered. Consequently, the reassessment was not properly conducted.

I found that the termination of these consumer price index adjustments was based on a mistake of law and followed an unfair procedure.

I recommended, pursuant to section 23 of the *Ombudsman Act*, that:

- The Ministry reinstate the consumer price indexing that was cancelled as a result of the misinterpretation and misapplication of the *Crime Victim Assistance Act* effective the date the indexing was discontinued.
- The Ministry make a lump sum payment to Ms. T. and the other victims of crime whose periodic payments were de-indexed as a result of the reassessments. The lump sum payment should be equal to the amount those individuals would have received if not for the reassessment and interest on that amount at the applicable court ordered rate.

- The Ministry develop written policies and procedures to ensure that reassessments under section 12 of the *Crime Victim Assistance Act* are undertaken only when new information has been received or a change in individual circumstances has occurred that might reasonably affect a person's eligibility for compensation.
- The Ministry develop written policies and procedures for the use of the reassessment power set out in section 12 of the *Crime Victim Assistance Act* that ensure such power is always exercised in accordance with the principles of administrative fairness.
- The Ministry of Public Safety and Solicitor General review its procedures and take measures to reduce the likelihood that the procedural deficiencies identified in my findings are not repeated in the future.

I am very pleased to report that the Minister of Public Safety and Solicitor General has agreed to accept each of my recommendations.

This case highlights:

- The importance of careful planning for the transition from old programs to new ones.
- The need for government authorities to adhere to principles of administrative fairness.
- The Ombudsman's role in upholding the democratic principles of openness, transparency and fairness.

Ms. T.'s husband was killed as a result of a criminal act on May 5, 1997. The person responsible for the crime committed suicide. According to records provided by the Crime Victim Assistance Program, there was no evidence that Ms. T.'s husband "contributed in any way whatsoever to his [own] death."

Original Application

Ms. T. applied for compensation under the *Criminal Injury Compensation Act*. At the time, the *Act* was administered by the Criminal Injury Section of the Workers' Compensation Board. The Criminal Injury Section determined that, as an immediate family member of a deceased victim of crime, Ms. T. was eligible for compensation for certain expenses and for loss of support.

The decision awarding compensation, dated September 8, 1997 contained the following provisions:

Pursuant to Section 3(1)(b)(ii) of the Criminal Injury Compensation Act periodic payments made to immediate family members must be of the same amount and for the same duration as payments made to dependents under Section 17 of the Workers' Compensation Act subject to the provisions of the Criminal Injury Compensation Act. In accordance with these provisions an award equal to 60 per cent of the monthly rate of compensation which would have been payable if [Ms. T.'s husband] had at the date of his death sustained a permanent total disability is payable.

...Sixty per cent of the compensation payable is ... the amount of the periodic payment granted to [Ms. T.] in accordance with the above mentioned provisions. The periodic award will be subject to consumer price index adjustments effective in the first and seventh month of each following year. Such periodic payments will continue until [Ms. T.'s] demise.

Confirmation of Life Indexing and Forfeiture of Litigation Proceeds

At about the same time, Ms. T. commenced a civil action against the estate of the person who killed her husband. During the litigation, Ms. T. enquired about how the proceeds from her litigation would affect the periodic payments awarded by the Criminal Injury Section.

On July 27, 1998, Ms. T. was informed by a lawyer for the Criminal Injury Section that to remain eligible for the compensation award, she would be required to forfeit the net proceeds of her civil settlement to the Criminal Injuries Section.

In the same letter, information regarding Ms. T.'s award was provided. That part of the letter began:

As you are aware, you will continue to receive indexed loss of support payments until your death.

Before agreeing to forfeit the proceeds from her settlement, Ms. T.'s lawyer wrote to the Criminal Injury Section to confirm his understanding of the award. In a letter dated July 7, 1999, he wrote:

Before proceeding any further, would you please confirm that [Ms. T.] has been awarded a lifetime pension in the initial amount of ... per month, increasing twice a year in line with increases in the Consumer Price Index for all of Canada.

On July 9, 1999, a lawyer for the Criminal Injury Section responded as follows:

I confirm that [Ms. T.] has been awarded a lifetime loss of support payment in the initial amount of ... per month, subject to twice annual consumer price index adjustments. Generally these are increases but if the index falls, then there could be a decrease or it may just remain constant.

Following this assurance, Ms. T. chose to forfeit the net proceeds from her civil action. She continued to receive indexed periodic payments until June 30, 2002.

Introduction of the *New Crime Victim Assistance Act*

On August 22, 2001 the Minister of Public Safety and Solicitor General introduced the *Crime Victim Assistance Act* to the Legislative Assembly for second reading. At that time, the Minister stated that awards for pain and suffering would be eliminated under the new *Act*. He then stated that all other existing benefits would be maintained.

On April 9, 2002 the Minister introduced the *Criminal Injury Compensation Amendment Act* to the Legislative Assembly for second reading. On that date, he stated:

Mr. Speaker, the Criminal Injury Compensation Amendment Act, 2002 amends Sections of the Criminal Injury Compensation Act. Members of this Legislature will remember that the new Crime Victim Assistance Act was passed last year. The new act transfers responsibility for criminal injury compensation from the Workers Compensation Board to the Ministry of Public Safety and Solicitor General.

It is designed to make services to victims more efficient and responsive. It enhances the benefits to victims of crime by strengthening and increasing the range of benefits provided. These benefits include medical and dental care; vocational rehabilitation for victims of crime and members of the victim's family; income support for the victim or their family for lost or reduced income; counselling for the victim or their family; counselling for the witnesses of crime; protective measures to ensure the safety of a victim; travelling expenses for a victim or their family; and compensation to the victim's family for the loss of love, guidance and affection.

However, the act is not yet in force. Proclamation of this act is expected early this summer. In the meantime, these amendments are an interim measure that makes pain and suffering awards consistent between the old and the new programs.

The Criminal Injury Compensation Amendment Act, 2002 will remove pain and suffering awards in respect of applications received on or after April 16, 2002. Applicants will still be entitled to all other benefits under the act.

Decision to De-index Ms. T.'s Payments

In July 2002, Ms. T. received an undated, unsigned form letter from the Ministry of Public Safety and Solicitor General advising that on June 30, 2002, the *Crime Victim Assistance Act* came into force and the Crime Victim Assistance Program became operational. The letter included the following paragraph:

If you have been receiving pension payments from the Criminal Injury Compensation Program you will continue to receive those payments at the rate that was in effect on June 30, 2002. The new Crime Victim Assistance Act is not linked to the Workers' Compensation Act and, therefore, cost of living increases on pension amounts will no longer be included.

The letter provided a link to the Crime Victim Assistance Program's website and extended an invitation to contact the Program, but offered no other explanation as to why cost of living increases would not be applied in the future. The letter also offered no information regarding the review options that applied in the circumstances.

Ms. T. said that when she contacted the Crime Victim Assistance Program to discuss her concerns about the decision not to make further cost of living adjustments, she was referred to the Ombudsman's Office.

Ms. T. contacted this office in February 2003 and we began looking into this matter. We communicated with the Crime Victim Assistance Program over the course of the following months to determine the basis for these actions.

Initial Position of the Crime Victim Assistance Program and Ombudsman Response

The Crime Victim Assistance Program informed us that sections of the *Criminal Injury Compensation Act* that provided for the indexing of periodic payments were repealed on June 30, 2002. We were told the *Crime Victim Assistance Act* required that individuals who were receiving a pension under the former *Act* would have their payments "red circled" at the amount they were receiving on the date the *Crime Victim Assistance Act* came into force. The Crime Victim Assistance Program was of the view that to continue the indexing of periodic payments would be contrary to the new legislation, and noted that it had acted on the basis of legal advice.

In December 2003, we asked whether the Crime Victim Assistance Program would share the legal opinion on which it was relying or alternatively, whether it would provide a synopsis of that opinion.

In July 2004, the Crime Victim Assistance Program provided a synopsis of a legal opinion it received.

The synopsis did not fully address our concerns. While we recognized that the *Crime Victim Assistance Act* authorized the enactment of regulations that would terminate or adjust the terms of compensation to which a person may have been entitled under the *Criminal Injuries Compensation Act*, it appeared that no such regulation was enacted. We did not see how other sections of the *Act* or regulations that were referenced were applicable and had effect in this case.

Response of the Assistant Deputy Minister

In September 2004, we wrote to the Assistant Deputy Minister for Policing and Community Safety Branch. We asked the Assistant Deputy Minister to:

- Explain the Crime Victim Assistance Program's assertion that the termination of cost of living adjustments in Ms. T.'s circumstances was supported by the applicable legislation;
- Clarify whether the Ministry believed the current legislation barred the continuation of cost of living adjustments or whether it authorized the termination of those adjustments;
- Comment on the fairness issues raised by Ms. T.'s case;
- Clarify the explanation provided in the Ministry's July 2002 letter to Ms. T. regarding the termination of cost of living adjustments; and
- Indicate how many other individuals would have had cost of living adjustments discontinued.

We sent a follow-up letter in December 2004 and received a response very shortly thereafter. The Assistant Deputy Minister provided a detailed response to the first item listed above, but did not in our view, fully address the others.

In January 2005, we wrote again to the Assistant Deputy Minister and requested a response to the questions or issues from our September 2004 letter that we believed were not fully addressed. We sent a follow-up letter in April 2005.

In August 2005, we received a response from the Assistant Deputy Minister to our January 2005 letter. The Assistant Deputy Minister's letter addressed the remaining questions from our September 2004 letter, except that it did not include any clarification regarding the reasons provided in the Ministry's July 2002 letter for terminating the cost of living increases.

Response of the Deputy Minister

In September 2005, the then Ombudsman, wrote a letter to the Deputy Minister in which he made tentative findings and recommendations under section 17 of the *Ombudsman Act*.

Section 17 provides a process whereby the Ombudsman informs the authority or other affected party of possible grounds for making a recommendation under the *Ombudsman Act*. The process also provides the authority with an opportunity to respond to those grounds before a formal finding or recommendation is made.

The Ombudsman's letter to the Deputy Minister included the following paragraphs:

The Ministry has not identified and we are not aware of any regulation enacted under Section 26(3) or any other Section of the *Crime Victim Assistance Act* that would terminate the consumer price index adjustments awarded to [Ms. T.]. In the absence of such an enactment, we believe that the rights [Ms. T.] acquired under the *Criminal Injury Compensation Act*, and in particular the right to consumer price index adjustments, are not affected by the repeal of the *Criminal Injury Compensation Act*.

I am considering making a finding that the decision to terminate the consumer price index adjustment awarded to Ms. T. was based on a mistake of law and/or that the decision was unjust.

In the event that I make either or both findings, I am considering making a recommendation that the Ministry reinstate [Ms. T.'s] consumer price index adjustment retroactively to the date on which it was terminated. In the event that I find that the decision was based on a mistake of law, I may also make a recommendation that the Ministry review the other cases where consumer price index adjustments were terminated and reinstate any adjustments that may have been improperly terminated.

We met with the Deputy Minister, the Director of the Crime Victim Assistance Program and counsel for the Ministry in November 2005. At that meeting, our office was informed that shortly after the *Crime Victim Assistance Act* was brought into force, the Director reassessed the eligibility of Ms. T. and other individuals receiving indexed periodic payments. Although the authority to conduct reassessments had been drawn to our attention, we had not previously been informed that a reassessment had been conducted.

The Deputy Minister agreed to give further consideration to the issues raised in our section 17 letter and to those discussed during that meeting.

We reviewed the *Crime Victim Assistance (General) Regulation* in light of the new information we received. We noted the regulation provided that if periodic payments awarded under section 3(1)(b)(ii) of the *Criminal Injury Compensation Act* were reassessed, the applicant would be eligible to receive a benefit equal to the amount and subject to the same terms and conditions that were available under the *Criminal Injury Compensation Act* as it read on the date of the reassessment. We also noted that the provisions of the *Criminal Injury Compensation Act* that allowed for consumer price index adjustments had been repealed the week prior to these reassessments being done. In light of that, once the reassessment was initiated, the Director did not have the option to award cost of living adjustments following the reassessment.

In February 2006, the Deputy Minister provided a written response and enclosed a copy of another legal opinion received by the Crime Victim Assistance Program. He wrote:

After carefully reviewing the facts of [Ms. T.'s] case, and considering the legal opinion provided, we have decided that we will not be offering an ex gratia payment on her behalf.

There are a number of reasons that give rise to this decision.

First, ... there was no discretion that would have allowed the Director of the Crime Victim Program to allow the cost of living adjustments to continue. Our view is that the Director can only exercise discretion in accordance with the Act and the Regulations and in this case the general discretion provided by the Act was limited by the specific provisions in the Regulations.

Secondly, from a policy perspective, [Ms. T.] has fared far better under the legislative scheme, despite the change, than she would have done had she simply taken the settlement negotiated by her counsel and accepted by her. ... Even without the cost of living increases, she has clearly sustained a benefit far in excess of what would have been provided by her settlement.

In April 2006, we wrote to the Deputy Minister advising that we still had concerns regarding the cancellation of the cost of living increases and that our investigation was continuing.

In May 2006, our Director of Investigations wrote to the Deputy Minister. In that letter:

- We questioned whether discretion might have been exercised in making the decision to reassess the periodic awards made under the *Criminal Injury Compensation Act*.
- We noted that section 12 of the *Crime Victim Assistance Act*, which authorized the program to modify benefits when a re-assessment was done, did not require a reassessment to be undertaken in these circumstances.
- We noted that section 34(8) of the *Crime Victim Assistance (General) Regulation*, which was cited by the Ministry as requiring the elimination of indexing when a reassessment occurs, did not appear to require that a reassessment be done.
- We noted that section 29(6) of the *Crime Victim Assistance Act* states, "Any compensation awarded under the former Act is deemed to be a benefit awarded under this Act."
- In view of section 29(6), we questioned whether a reassessment under section 12 of the Act was required in order for compensation awarded under the *Criminal Injury Compensation Act* to remain payable under the *Crime Victim Assistance Act*.

- We asked whether there was any new information or change in circumstances, other than the legislative changes noted above, that led to the decision to undertake a reassessment. We also asked whether Ms. T. was given any opportunity to make submissions prior to the decision to reassess her eligibility for benefits.

In July 2006 the Deputy Minister responded. He stated that reassessments were necessary in order to establish the new benefit levels under the new legislation. He said that section 12(3) of the *Crime Victim Assistance Act* provides that the Director may reassess a person's eligibility for a benefit on her own initiative and that no information was required, provided or requested in any of the cases like Ms. T.'s that were reassessed when the *Crime Victim Assistance Act* came into force. Finally, he said that no submissions were requested from any of the individuals with cases like Ms. T.'s that were reassessed because the benefits that formed the subject of the reassessment were established by statute.

I had a number of concerns regarding the decision that led to the de-indexing of the payments awarded to Ms. T. and others as well as concerns regarding the process related to that decision.

The former Minister's statements to the Legislative Assembly regarding the *Crime Victim Assistance Act* represent the guiding principles under which the legislation was drafted and the program was to be administered. As such, the former Minister's statements regarding the changes to the legislation and the program provide important context for this discussion.

I will discuss my concerns regarding the decision first.

The Ministry argued that reassessments under section 12 of the *Crime Victim Assistance Act* were necessary in order to make benefits awarded under the former program payable under the new program.

As noted above, section 29(6) of the *Crime Victim Assistance Act* states, "any compensation awarded under the former *Act* is deemed to be a benefit under this *Act*." I believe this provision was sufficient to enable compensation awarded under the former *Act* to be continued by the Crime Victim Assistance Program.

Once deemed a benefit, compensation awarded under the former *Act* was subject to any adjustments that might be required or authorized under the Crime Victim Assistance legislation including adjustments that might result from the appropriate use of the reassessment provisions in the *Act*.

In Ms. T.'s case and in others, it would appear that reassessment was neither required nor properly undertaken.

The reassessments were carried out under section 12 of the *Crime Victim Assistance Act* which states:

- 12** (1) A person receiving a benefit or the applicant for that person must, in writing, notify the director as soon as practicable, if the person's circumstances have changed in a manner that affects or may affect the person's eligibility for the benefit.
- (2) An applicant, or a person for whom an application has been made under Section 3(1), may at any time:
- (a) provide the director with new information that may affect the eligibility for a benefit, and
 - (b) after providing the new information under paragraph (a), request a reassessment of the eligibility for the benefit of the person by or for whom the application was made.
- (3) On the director's own initiative or on receipt of information, the director may reassess a person's eligibility for a benefit.
- (4) Subject to the regulations, the director may do any of the following on the basis of the reassessment:
- (a) provide, refuse to provide, suspend or terminate the provision of a benefit;
 - (b) limit, increase or decrease a benefit;
 - (c) alter the amount, duration, nature, content or form of the benefit;
 - (d) impose or modify conditions for receipt of the benefit or any other benefit being provided.

- (5) The director must notify an applicant, or a person for whom an application has been made under section 3(1), in writing of the result of the reassessment.

Section 34(8) of the *Crime Victim Assistance (General) Regulation* sets limits on the benefits that could be awarded to Ms. T. and others following a reassessment under section 12. Section 34(8) states:

- (8) If periodic payments awarded to a former applicant under section 3(1)(b)(ii) of the former Act are reassessed under section 12 of the Act or reconsidered under Section 14 of the Act, the former applicant is eligible to receive a benefit equal to the amount of, and subject to the terms and conditions for, the periodic payments that may be awarded under the former Act.

Neither of those sections imposed any obligation on the Director to conduct a reassessment. Section 12(3) of the *Act* states that the Director "may reassess a person's eligibility for a benefit." Section 34(8) states, "If periodic payments ... are reassessed."

There is nothing in the express terms of either provision or any other provision identified that would require a reassessment before periodic payments awarded under the *Criminal Injury Compensation Act* could continue to be paid.

Section 12(1) of the *Act* provides for the reassessment of a person's eligibility for a benefit if there are changes in circumstances or new information that might have a bearing on the person's eligibility. Section 12(3) authorizes the Director to conduct reassessments based on receipt of information from a person receiving a benefit or on his or her own initiative.

In my view, when read in the context of section 12 as a whole, the power of the Director to undertake a reassessment on his or her initiative is limited to situations in which the Director becomes aware of information or a change of circumstances that affect a person's eligibility for a benefit. In those situations, the reassessment can be done irrespective of whether the information came from the person who is receiving the benefit, and irrespective of whether the person is requesting a reassessment. Moreover, the Director's discretion to initiate a reassessment cannot be exercised arbitrarily or without good reason. Further, the Director must not fetter his or her discretion by conducting the reassessment in a blanket fashion without regard for the individual circumstances of each case.

Although the above conclusion was sufficient to dispose of this case, and while it was not necessary to rely upon any "vested rights" arguments to substantiate this complaint, I would further note that, even if there were any ambiguity in the interpretation of section 12 of the *Act*, that ambiguity should be resolved in a manner that does not deny people existing benefits unless the intention of the Legislature is clear in this regard. As the Supreme Court of Canada stated in *Canada (A.G.) v. Lavery* (1991) 76 D.L.R. (4th):

The purpose of rules of restrictive interpretation of this sort is not to "cut down" the effect of a legislative enactment. It is to guard against the danger of giving to words of the legislature wider effect than the legislators may in fact have intended. Where rights are to be taken away, the court must be satisfied that the mind of the draftsman, and therefore of the legislators, was indeed directed to the point before giving retrospective effect to such a change – that is to say, the court must be satisfied that the legislators did indeed intend to take away rights already "vested."

The former Minister stated to the Legislative Assembly that under the new legislation, applicants would no longer be entitled to awards for pain and suffering. He stated that all other benefits would be maintained.

If the Legislature or Cabinet had intended to terminate consumer price index adjustments in all cases, either body could have introduced a specific provision in the *Act* or regulations to this effect. Neither the legislature nor cabinet did so.

As I noted above, I do not believe that a reassessment under section 12 was necessary in order to continue paying compensation awarded under the former *Act*. There was no new information received, no change of circumstances reported and there would appear to have been no other appropriate reason to reassess Ms. T.'s eligibility and the eligibility of others.

In addition to my concerns regarding the decision, I also had concerns regarding the decision-making process.

Administrative decisions must be made using a process that is fair and appropriate. What constitutes a fair and appropriate process will vary depending on a number of factors such as the importance of the decision to the individuals affected, the nature of the decision being made and the legislative context from which the decision is made.

While it was not necessary to determine the precise standard of procedural fairness required in this case, it is indisputable that the standard was at least minimal. In fact, there were factors in this case, including those described below, that would influence a higher standard of procedural fairness.

The decision to conduct a reassessment would potentially have significant consequences for the recipients of indexed periodic payments. From the date of Ms. T.'s initial award in September 1997 to the date the consumer price index adjustments were discontinued on June 30, 2002, her monthly payment increased by approximately 10 per cent from the initial monthly award. Consumer price index adjustments were a valuable component of the awards made to Ms. T. and others and any decision that would lead to the termination of those adjustments was one of importance.

The Crime Victim Assistance Program's decision applied to a relatively small group of individuals rather than to the community as a whole. The decision did not have to be made immediately to address a public safety issue or other emergency. This was not an interim or preliminary decision. There does not appear to have been any statutory relief from procedural requirements or any reason to believe that providing procedural safeguards would frustrate the Crime Victim Assistance Program's ability to carry out its mandate. These are all factors that would warrant a higher standard of procedural fairness.

The Ombudsman's Public Report No. 42, *Code of Administrative Justice* states with respect to unfair procedure, "at a minimum, fairness will usually require adequate notice of the proposed action, as well as of the criteria to be applied, plus an opportunity to make representations." This minimum standard was not met.

DISCUSSION AND ANALYSIS

I understand that Ms. T. and the others who were receiving indexed periodic payments were given no advance notice of the decision, no information regarding the factors upon which the decision would be based, and no opportunity to present information or attempt to influence the outcome. These were not the only procedural problems.

The provision of reasons for decisions is fundamental to administrative fairness. In some circumstances, particularly when a decision is subject to a right of appeal or when the decision is one of importance to an individual, a common law duty to provide reasons exists.

Reasons help to ensure that relevant issues are taken into account and that the rationale behind the decision is carefully considered. Reasons allow individuals affected by the decision to understand the factors considered by the decision-maker and enable the formulation of an appeal. Reasons also increase the likelihood that the affected party will accept the decision and feel that they were treated fairly.

The reasons provided in the unsigned July 2002 letter to Ms. T. and others did not facilitate understanding of the factors considered and the rules applied by the decision-maker or draw any link between the two. The reasons were: "The *Crime Victim Assistance Act* is not linked to the *Workers Compensation Act* and, therefore, cost of living increases on pension amounts will no longer be included." These reasons were confusing and insufficient to enable Ms. T. and others to determine whether there were grounds on which to dispute the decision.

Individuals adversely affected by a decision should also be informed of any right of appeal or review available in respect of the decision. Section 13 of the *Crime Victim Assistance Act* provides for the reconsideration of any decision, following reassessment under section 12, to vary the terms of an award. The letter to Ms. T. and others following the reassessment of their eligibility and the alteration of their award did not provide any information regarding the right of review that appeared to exist. This information should have been provided whether or not the Ministry believed the reconsideration would have been successful or resulted in a change.

I found that the termination of consumer price index adjustments was based on a mistake of law and followed an unfair procedure.

- **MISTAKE OF LAW** — Although the *Crime Victim Assistance Act* continued compensation awarded under the earlier legislation, the Crime Victim Assistance Program effectively displaced this principle by making an administrative decision to reassess all indexed periodic payments awarded under the earlier legislation. There was no change in the circumstances of the individuals who were receiving those payments or other appropriate grounds to conduct a reassessment. I consider the decision to conduct the reassessments to be based on a mistake of law.
- **UNFAIR PROCEDURE** — The reassessment process was unfair. Ms. T. was given no prior notice that her eligibility for a benefit would be reassessed; was given no information about the criteria on which any such reassessment decision would be based; was provided no opportunity to present information that she felt might be relevant to and should be considered by the decision maker; was not given reasons for the decision that would allow her to understand how the merits of her particular reassessment had been decided, and was not advised of the regulatory right of reconsideration available to her. This violates basic principles of administrative fairness and thus constitutes an unfair procedure. I understand the same process was followed in all of the reassessments.

I recommended, pursuant to section 23 of the *Ombudsman Act*, that within 90 days:

- The Ministry of Public Safety and Solicitor General review its procedures and take measures to reduce the likelihood that the procedural deficiencies identified in my findings are repeated in the future.
- The Ministry develop written policies and procedures to ensure that reassessments under section 12 of the *Crime Victim Assistance Act* are undertaken only when new information has been received or a change in individual circumstances has occurred that might reasonably affect a person's eligibility for compensation.
- The Ministry develop written policies and procedures for the use of the reassessment power set out in section 12 of the *Crime Victim Assistance Act* that ensure such power is always exercised in accordance with the principles of administrative fairness.
- The Ministry reinstate the indexing that was cancelled as a result of the misinterpretation and misapplication of the *Crime Victim Assistance Act* effective the date the indexing was discontinued.
- The Ministry make a lump sum payment to Ms. T. and the other victims of crime whose periodic payments were de-indexed as a result of the reassessments. The lump sum payment should be equal to the amount those individuals would have received if not for the reassessment and interest on that amount at the applicable court ordered rate.

Re

In November 2006, a draft of this report was sent for the Minister of Public Safety and Solicitor General's response.

On January 25, 2007, the Minister of Public Safety and Solicitor General advised that he would respond to my November 24, 2006 letter once his staff had reviewed my findings and recommendations. We met with the Minister a few weeks later and he indicated that his Ministry believed the applicable legislation was clear and that it provided for the termination of cost of living adjustments.

For the reasons that are outlined in detail elsewhere in this report, we did not agree that the legislation clearly provided for the termination of cost of living adjustments. In fact, we believed the legislation and section 29(6) of the *Crime Victim Assistance Act* in particular provided for the continuation of indexed periodic payment awarded under the former *Act*.

We shared these views with the Minister and, before agreeing to provide a formal response to my findings and recommendations, he directed that a review be conducted for any other relevant material.

A few weeks later, we met with the Deputy Minister and the Director of the Crime Victim Assistance Program. At that meeting, we were presented with a collection of documents and we were told that although the documentation did not specifically demonstrate that the Legislature or Cabinet intended to terminate the indexing of periodic payments awarded under the *Criminal Injury Compensation Act*, the documentation did provide context for the decisions that were made.

After reviewing the documentation provided by the Ministry, I found nothing that was inconsistent with the statements of fact made in my November 24, 2006 letter to the Minister and nothing that would cause me to reconsider the findings and recommendations made in my letter. If anything, in my view, that documentation reconfirmed and strengthened the position put forward in my letter to the Minister.

I advised the Minister of this and suggested the Ministry may wish to reconsider its position in light of the latest material the Ministry had provided to me.

On April 19, 2007, the Minister of Public Safety and Solicitor General advised that the government recognized that the legislation enacting its 2002 policy changes was open to more than one interpretation and, as a result, had decided to re-instate cost of living adjustments as of June 30, 2002 for Ms. T. and all individuals in the same circumstances as Ms. T. The Minister advised that this would mean a retroactive payment to each individual. This was confirmed in his letter dated May 8, 2007 which is attached at Appendix A.

I met with the Deputy Minister the following week and received confirmation that the Ministry also accepted my recommendations that were intended to reduce the likelihood that the procedural deficiencies identified in my findings were repeated in the future.

Conclusion

I am pleased with the Minister's decision to accept each of these recommendations and, by doing so, demonstrate his Ministry's willingness to resolve an unfair situation as well as his commitment to improving the Ministry's administrative processes.

I am also pleased that the Ombudsman's Office was able to fulfill an important part of our role. The first Ombudsman for British Columbia wrote in the 1979 Annual Report:

Large organized groups are usually well-equipped to pursue their interests and to protect their rights. However, many individuals and some groups often lack the resources of time and money to realize their interests or to protect their rights in the face of the complex mass of rules, regulations, programmes and agencies which make up modern government. It can be an unequal struggle at every stage. The appointment of an Ombudsman represents one effort of many by the Legislature to restore the balance. Ombudsmen use their powers of investigation and recommendation to strike a reasonable balance between the bureaucracy's general implementation of public policy and the citizen's legitimate expectation to be treated as an individual.

This case illustrates that message. The issues in this case were not straightforward. The government, having made a decision and taken action, was committed to its position. Much of the information that needed to be obtained, reviewed and analyzed was not readily accessible. As an individual, Ms. T. had only limited information about the decision, limited legal and other resources, limited access to senior members of the Ministry and, practically speaking, limited ability to overcome the imbalance in power. This office helped to restore that balance and achieve a fair result.

Most of all, I am pleased for Ms. T. and the people in the same situation who will receive the indexed periodic payments they were promised and to which they were entitled.

APR 11 2007



May 8, 2007

Ms. Kim Carter
Ombudsman
PO Box 9039 Stn Prov Govt
Victoria BC V8W 9A5

Dear Ms. Carter:

I am responding to your May 4, 2007 letter addressed to Mr. David Morhart regarding the Crime Victim Assistance Program.

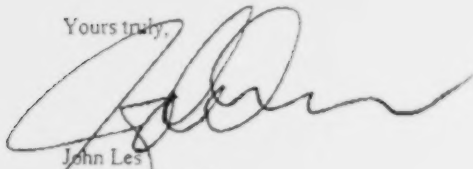
The government recognizes that legislation enacting changes to the support and assistance available to victims of crime enacted in 2002 is open to more than one interpretation. In our view, the reassessments conducted to advise claimants of the legislative changes to the cost-of-living adjustments were done in good faith to enact government policy and to ensure that these claimants were able to have their pensions continue under the new legislation.

However, in light of the discussions with your office and the acceptance that there may be different interpretations of the legislation, government is willing to re-instate the cost of living provisions retroactively to June 30, 2002 for those claimants who were previously entitled to such adjustments.

Your recommendations have been reviewed and processes are in place to ensure a fair and appropriate process for conducting reassessments under the legislation.

I am pleased that we were able to reach a satisfactory resolution on this issue, and that in so doing we have highlighted our commitment to supporting victims of violence and their families throughout the province.

Yours truly,


John Les
Solicitor General

cc: Mr. David Morhart

Ministry of
Public Safety
and Solicitor General

Office of the Minister

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